IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.231 OF 1999

DIST. BOMBAY

Shri Kishore Bhau Shinde residing at)
Mahasagar Chawl Committee, Chawl)
No.13, Kamraj Nagar, Ghatkopar (E),)
Mumbai – 400 077 at present at Nasik)
Central Prison, Nasik.) ... Appellant / Orig. Accused 2

Versus

The State of Maharashtra)
(At the instance of Pant Nagar Police)
Station).) ... Respondent

Mr. A.H.H. Ponda for the appellant / original accused 2.

Mr. S.R. Borulkar, Public Prosecutor for the respondent- State.

CORAM : SMT. RANJANA DESAI &
D.G. KARNIK, JJ.

DATE ON WHICH THE JUDGMENT RESERVED : 13TH MARCH, 2006.

DATE ON WHICH THE JUDGMENT PRONOUNCED : 3RD APRIL, 2006.

JUDGMENT : (Per Smt. Ranjana Desai, J.)

1. The appellant, original accused 2 (for short, "A-2") was tried along with four others (for short, "A-1", "A—3", "A--4" and "A--5" respectively) for offence punishable under section 120-B of the Indian Penal Code (for short, "the Code") in Sessions Case No.359 of 1998. A-1, A-2 A-3 and A-4 were also charged under section 302 read with section 34 of the Code. The learned Additional Sessions Judge, Greater Bombay, by the impugned judgment and order dated 9/4/1999 acquitted all the accused of the offence punishable under section 120-B of the Code. He acquitted A-1, A-3 and A-4 of the offence under section 302 read with section 34 of the Code. He convicted A-2 for the offence punishable under section 302 read with section 34 of the Code and sentenced him to suffer rigorous imprisonment for life and also to pay a fine of Rs.1,000/- and, in default, to suffer rigorous imprisonment for one month. Being aggrieved by this judgment and order, A-2 has preferred the instant appeal.

2. It would be advantageous to give the gist of the facts :

PW-1 Vasant Bhosale is the Police Nayak, who was at the relevant time, attached to Pant Nagar Police Station. According to him, on 11/12/1997, he was on night duty. He reached Pant Nagar

Police Station at 7.00 p.m. He was posted at Kamral Nagar Chowky. At about 10.45 p.m., one Devendra Bhurjiwala came and informed that one Ganpat was being assaulted by 3-4 persons near the dispensary of Dr. Kulkarni and he was lying there in a pool of blood. He went to the scene of offence with the said Devendra Bhurjiwala in a rickshaw. He found one person lying in an injured condition in a pool of blood. The wife of the injured by name Kavita and his mother Krishnabai were crying and saying that A-2 and his associates had attacked the injured. With the help of Narayan Shetty and Ganesh, he removed the injured to Rajawadi Hospital. The mother of the injured and Narayan Shetty sat in the rikshaw. Before leaving the spot, he informed PW-9 PSI Bhosale, who was at Pant Nagar Police Station, on phone, about the said incident. PW-9 PSI Bhosale made station diary entry [Ex.P-32/A]. At the Rajawadi Hospital, the doctor declared the injured, dead. When PSI Bhosale reached the hospital, PW-1 Vasant Bhosale narrated the incident to him. PW-9 PSI Bhosale recorded his statement. According to PW-1 Vasant Bhosale, the wife of the deceased had told him that the deceased was assaulted with sharp edged weapons like knives and choppers by A-2 and his associates. According to the prosecution, on the basis of the statement of PW-1 Vasant Bhosale, which is at Ex-P-12, the investigation started. The statement of witnesses came to be recorded. Post-mortem was done on the deceased. There were 52

external injuries on the person of the deceased and the cause of death was haemorrhage and shock due to multiple incised stab wounds and incised wounds by sharp edged weapons (Unnatural). After completion of the investigation, the accused came to be charged as aforesaid.

3. The prosecution examined, in all, 12 witnesses. The star witnesses of the prosecution are PW-2 Kavita, the wife of the deceased and PW-3 Krishnabai, the mother of the deceased. PW-8 Dr. Ashok Shinde proved the post-mortem notes. Details of investigation were given by PW-9 PSI Hanumant Bhosale. PW-10 PI Charudatta Zendekar and PW-12 PN Bhanudas Kadam, who were attached to Pant Nagar Police Station at the relevant time. The defence of the accused was one of denial. After perusing the evidence on record, the learned Sessions Judge, convicted the accused as above and, hence, this appeal by A-2.

4. We have heard, at some length, Mr. Ponda, the learned counsel appearing for A-2 and the learned Public Prosecutor Mr. Borulkar. With the assistance of the learned counsel, we have gone through the record.

5. Mr. Ponda, the learned counsel for A-2 contended that the

learned Sessions Judge has erred in convicting A-2 when there is no cogent and credible evidence on record to establish his involvement. He submitted that there are several serious infirmities in the evidence of PW-2 Kavita and PW-3 Krishnabai, which negative their claim of being eye-witnesses. He submitted that the testimony of PW-1 PN Bhosale to the effect that PW-2 Kavita and PW-3 Krishnabai gave the name of A-2 to him is falsified. PW-2 and PW-3 deny having any talk with him. He claims that he gave these names to the police station. But this is falsified by the dairy entry made by PW-9 PSI Bhosale and the admission of PW-9 PSI Bhosale. Mr. Ponda submitted that the conduct of PW-2 Kavita is unnatural. She did not disclose the names of the assailants to anyone after Mangala told her that her husband was dead. She did not tell the names of the assailants when the police came to her house and made enquiries with her. Till 2.30 p.m. when she went to the police station, she did not disclose the names of the assailants to anyone. According to her, the Beat Office was seven minutes walking distance but surprisingly she did not go to the Beat Office to inform about the incident. She did not go to the hospital when her husband was lying there seriously injured. Her unnatural conduct makes her testimony doubtful.

6. Mr. Ponda pointed out that whereas PW-3 Krishnabai says that both she and PW-2 Kavita disclosed the incident to the police, PW-2

Kavita says that they did not. Mr. Ponda submitted that there are number of contradictions in the evidence of these two witnesses. PW-2 Kavita has stated that A-1 dropped the weapon which he was holding. But PW-3 Krishnabai has stated that the weapon was dropped by A-2. PW-2 Kavita has said that PW-3 Krishnabai raised her hands and told A-2 not to assault the deceased but PW-3 Krishnabai has said that she laid on the deceased and told A-2 not to assault the deceased. PW-2 has said that A-1, A-3 and A-4 ran away before PW-3 Krishnabai intervened. However, PW-3 Krishnabai has said that she laid on the deceased and thereafter all the accused ran away. PW-2 Kavita has said that first A-1 ran away, then A-3 ran away and after some time A-4 ran away and they all ran towards highway direction. PW-3 Krishnabai has said that they ran towards the lane. Mr. Ponda contended that these discrepancies as regards the incident in question are fatal to the prosecution case. They suggest that the incident has not taken place in the manner in which the prosecution wants the court to believe it has taken place. Mr. Ponda pointed out that PW-3 Krishnabai has said that she did not know the names of the accused and that none of the accused were shown to her. Then it is not understood as to how PW-3 Krishnabai disclosed the names of the accused to the police. He pointed out that no identification parade was held. This suggests that the police have concocted the prosecution story. Mr. Ponda

contended that in any event, rest of the accused have been acquitted on the basis of the same evidence and, therefore, since partly the evidence of these witnesses has been disbelieved, it is not prudent to place reliance on their testimony. PW-2 Kavita being the wife was expected to name the assailants after seeing the incident. Her conduct of not disclosing the names is highly unnatural. It is not explained by the prosecution and, hence, A-2 must get benefit of doubt. In this connection, he relied upon the judgment of the Supreme Court in *Shivaji Dayanu Patil v. State of Maharashtra, AIR 1989 SC 1762*.

7. Mr. Ponda also relied on the judgment of the Supreme Court in *Meharaj Singh (L/Nk.) v. State of U.P., 1994 SCC (Cri.) 1390*. In that case, widow of the deceased did not try to go anywhere near her husband after he fell down on account of injuries inflicted on him. The Supreme Court found that conduct unnatural and it was observed that in a situation like this, the normal conduct of the wife would be firstly to make an effort to save her husband. The Supreme Court did not place reliance on the evidence of the wife of the deceased and held that she was not present at the scene of offence. Mr. Ponda contended that the facts of this case are comparable to the facts of the present case. The evidence of PW-2 Kavita, therefore, needs to be kept out of consideration.

8. Mr. Ponda then relied on the judgment of the Supreme Court in *Ali Mollah and another v. State of West Bengal, 1996 Cri.L.J. 3842*. In that case, there was a murder of the employer of the eye-witness. The eye-witness admitted in the cross-examination that he did not tell anyone, even to his co-employees about the incident in question though next day he went to his work place. The prosecution did not offer any explanation for this silence. The Supreme Court found the conduct of the eye-witness unnatural and held that the claim of this witness that he was present at the scene of offence was doubtful. Relying on these cases, Mr. Ponda contended that the evidence of PW-2 Kavita and PW-3 Krishnabai must be rejected as unreliable.

9. Mr. Ponda contended that the trial court has rightly disbelieved the evidence of discovery of articles and, therefore, apart from the evidence of PW-2 Kavita and PW-3 Krishnabai, there is hardly any other evidence on record which can connect A-2 with the murder. Since the evidence of PW-2 and PW-3 is not credible, A-2 will have to be acquitted.

10. Mr. Ponda further contended that the case of the prosecution that PW-3 Krishnabai laid on the deceased and requested A-2 not to assault the deceased is falsified by the fact that the prosecution has

not explained what happened to the clothes of PW-3 Krishnabai. The Investigating Officer has categorically stated that the clothes of PW-3 Krishnabai were not seized. It was the duty of the prosecution to seize the clothes and send them to the chemical analyser to ascertain the blood group of the blood found on those clothes. If the blood found on the clothes of PW-3 Krishnabai were to match the blood group of the deceased, that would have been a clinching circumstance to support the prosecution case. Since the prosecution has not seized the clothes of Krishnabai, adverse inference needs to be drawn against it.

11. Mr. Ponda then submitted that in any event, even if this court believes the evidence of PW-2 Kavita and PW-3 Krishnabai, A-2 cannot be convicted under section 302 read with section 34 of the Code as wrongly done by the trial court. He submitted that both the witnesses have not attributed any specific role or overt act to A-2. If all the other accused are acquitted, A-2 cannot be convicted on the ground that he shared common intention with the other accused. The deceased had suffered 52 injuries. Since the witnesses have not stated which injury was caused by A-2, it cannot be said that the injury caused by A-2 was the fatal injury which resulted in the death. In such circumstances, A-2 could only be convicted for offence under section 325 of the Code. In this connection, he relied on the

judgments of the Supreme Court in *Baul and another v. State of U.P., AIR 1968 SC 728; Achhey Lal v. State of U.P., AIR 1978 SC 1233 and Atmaram Zingaraji v. State of Maharashtra, 1997 Cri.L.J. 4406*.

12. As against this, Mr. Borulkar, the learned public prosecutor contended that the evidence of PW-2 Kavita and PW-3 Krishnabai is consistent and cogent so far as involvement of A-2 is concerned. There are no major contradictions or discrepancies in their evidence on that aspect and they can always be believed partly. There is no reason for these two witnesses, who are related to the deceased to name a wrong person. He submitted that the fact that they did not report to the police immediately after the incident cannot be taken against them. It is obvious that they were scared because of the ghastly incident which had taken place and were in no position to even disclose the incident to anyone. The learned public prosecutor urged that the trial court has rightly convicted A-2 on the basis of the evidence of PW-2 Kavita and PW-3 Krishnabai. The learned public prosecutor submitted that merely because other accused are acquitted, A-2 cannot be acquitted when the evidence on record establishes his involvement. He relied on the judgment of the Supreme Court in *Rajan Rai v. State of Bihar, 2006 All MR (Cri.) 314 (S.C.)* and contended that even if the other accused are acquitted, A-2

could be convicted under section 302 read with section 34 of the Code. He urged that the conviction and sentence imposed by the trial court is justified and may not be disturbed.

13. We have given our anxious consideration to the submissions advanced by both sides. The learned Sessions Judge has recorded that the police have prepared false record. He has observed that it is amply clear that the investigation of the case has been done in a manner which suggests that there is probably collusion between the defence and the prosecution. According to the learned Sessions Judge, the police have not recorded the statements of the witnesses faithfully and distorted their version. He has commented on the fact that PW-6 Chandurkar was the common pancha for all the recovery panchnamas and he has deposed that all his signatures were taken in the police station where all articles were kept on the table. All the recoveries have been discarded on the ground that one person acted as pancha to all the panchnamas and he followed the police wherever they went. He was declared hostile. Another pancha PW-7 Ajay Jadhav has also turned hostile. We concur with the learned Sessions Judge that the investigation is done in a shoddy manner and in such circumstances, it is not possible to believe the discoveries on the basis of the evidence of the investigating officer.

14. But it is also necessary to note that PW-10 PI Zendekar has stated that he could not record the statements of about ten witnesses which include Ganesh and Narayan. Because they had left their places without leaving any trace behind, the summonses could not be served on these witnesses. PW-10 PI Zendekar has further stated that witnesses Sanjaykumar, Devendra, Datta Lad and Dr. Pardeshi were not going to support the prosecution and, therefore, the prosecution has decided not to record their statements. PW-12 PN Kadam has also stated that he had gone to serve summonses on eight witnesses which include Narayan and Ganesh. He has stated that he could not serve the summonses on them as they had left their places without leaving any trace behind. Some of them had gone to Andhra Pradesh. He, therefore, prepared a report and submitted it to Sr. Inspector of Police. PW-10 PI Zendekar had prepared a report to that effect. PW-12 PN Kadam has produced the relevant documents in this connection which are on record at Ex.P-76 (Colly.). These documents indicate that the witnesses had left their residences and were not available to give evidence. It appears, therefore, that on account of this ghastly incident, a terror wave was unleashed in the concerned area and the witnesses were not willing to come forward to depose against the accused. Their not coming forward or making themselves scarce could be the result of threats given to them by the perpetrators of the crime. We have, however, no manner of doubt

that the investigation of such a grave crime should have been and ought to have been done in a better manner and perhaps there is room to say that lapses in the investigation indicate collusion between the defence and the prosecution as stated by the learned Sessions Judge. But certainly the benefit of this collusion cannot be allowed to be reaped by the accused if it is found that the substratum of the prosecution story has not given way.

15. If the evidence and the attendant circumstances establish that the accused have committed the crime, giving benefit of the collusion or negligence of the investigation to the accused would not be in the interest of justice. In *Kernel Singh v. State of M.P., 1995 (5) SCC 518 and in Dhanraj Singh @ Shera and Ors. v. State of Punjab, JT 2004(3) SC 380,* the Supreme Court has held that in the case of defective investigation, the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective.

16. In *Paras Yadav and Ors. v. State of Bihar, 1999 (2) SCC 126*, the Supreme Court has held that if the lapse or omission is committed by the investigating agency or because of negligence, the

prosecution evidence is required to be examined de hors such omission to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

17. In *Ram Bihari Yadav v. State of Bihar and Ors. 1998 (4) SCC 517*, the Supreme Court has observed that if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcing agency but also in the administration of justice. This view has been again reiterated in *Amar Singh v. Balwinder Singh and Ors., 2003 (2) SCC 518*. The defective investigation would not, therefore, deter us from convicting the accused if we find that de hors the defects the accused can still be convicted on the basis of the evidence on record.

18. Much criticism was levelled against PW-2 Kavita and PW-3 Krishnabai. It was argued that there are inconsistencies between the statements of these two witnesses and their conduct makes them unreliable witnesses. It was argued that the wife of the deceased PW-2 Kavita ought to have told the names of the accused to the police;

she should have rushed to the police and she should have stayed in the hospital throughout. PW-3 Krishnabai should have also stayed in the hospital. She should have immediately lodged a complaint. Numerous judgments of the Supreme Court were cited in support of this submission. In our opinion, the inconsistencies in the evidence of PW-2 Kavita and PW-3 Krishnabai are not of such nature as would make them unreliable witnesses. In the nature of things, two eye-witnesses cannot give identical evidence in a court of law. They may not see the incident from the same angle. They perceive it in a different manner. At one time, they may not concentrate on the same accused. When an attack is levelled by many persons, it may not be even possible to recapitulate the incident and narrate it with exactitude particularly when the witnesses are near relations of the deceased. On account of emotional trauma suffered by them they may make mistakes. If they give a parrot like version, it is possible to argue that they were tutored. In our opinion, in fact, some inconsistencies and discrepancies make them truthful witnesses. The witnesses tend to exaggerate the incident. The exaggeration by itself will also not make them untrustworthy, if the exaggeration does not affect the core of the evidence.

19. We may advantageously refer to the judgment of the Supreme Court in *Sucha Singh and Another v. State of Punjab*, *(2003) 7 SCC*

643. In that case, the Supreme Court was dealing with the credibility of related witness. The Supreme Court observed that the relationship is not a factor which would affect the credibility of a witness because it is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. All that the court had to do is to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. The Supreme Court then considered whether if a witness is partly disbelieved, his evidence has to be rejected in toto. The Supreme Court observed as under :

> *"The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. This maxim has not received general acceptance nor has it come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". The doctrine is a dangerous one, especially in India for if a whole*

body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. Falsity of a particular material witness or a material particular would not ruin it from the beginning to end. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment."

The Supreme Court further observed as under :

"So even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove the guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove the guilt of other accused persons. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing the essential details presented by the prosecution completely from the

context and the background against which they are made, the only available course to be made is to discard the evidence in toto."

20. Applying the above observations to the present case, we feel that the evidence of PW-2 Kavita and PW-3 Krishnabai cannot be discarded in toto. Being near relations of the deceased, they are not likely to conceal the actual culprit and make allegations against innocent persons. In our opinion, the inconsistencies must be viewed in the light of the state of mind of the witnesses. In fact, PW-3 Krishnabai has stated that she was not in a proper frame of mind and PW-10 PI Zendekar has confirmed that she was not in a proper frame of mind. PW-2 Kavita has also stated that she was not in a proper condition. The inconsistencies, in our opinion, do not affect the core of the evidence of these witnesses.

21. Presence of both the witnesses in their house on the relevant day can hardly be doubted. They are the most natural witnesses. The fact that Sharda came to inform them about the incident is also proved because Sharda has been examined by the prosecution as PW-4. No dent is made by the defence in this part of the prosecution story. PW-2 Kavita has stated that when PW-4 Sharda informed her about the incident, she went to the scene of offence and found that A-

1 to A-4 were assaulting her husband. A-1 had a khanjeer with him and others had weapons like sickle. They were assaulting the deceased with the said weapons. Therefore, according to this witness, A-2 was armed with a sickle. She has further stated that A-1, A-3 and A-4 ran away but A-2 was standing there. PW-3 Krishnabai intervened and told A-2 not to assault Ganpat but assault her. At that stage, she went home to bring her child. When she came back, she saw the khanjeer lying on the ground. PW-3 Krishnabai with the help of Ganesh and Narayan removed the deceased to the hospital in a rickshaw. Nobody else was there. She had no talk with anybody. PW-3 Krishnabai has also stated that she and PW-2 Kavita went to the scene of offence when PW-4 Sharda told them about the incident. The deceased was lying on the road and A-1 to A-4 were standing there. A-1 was armed with khanjeer and A-2 was armed with a sickle. A-3 and A-4 were armed with long weapons. A-1 to A-4 were assaulting the deceased with their weapons. PW-3 Krishnabai laid on her son in order to save him. A-1, A-3 and A-4 assaulted and ran away. A-2 dropped his sickle and ran away. In the examination-in-chief, she has said that she did not see where they ran away and in the cross-examination, she has said that she saw them running away in a lane. Both these witnesses are consistent about the fact that A-2 along with others was present at the scene of offence and A-2 was armed with a weapon; A-2

assaulted the deceased and PW-3 Krishnabai intervened in order to save the deceased and all the accused ran away. On this aspect, the evidence of these witnesses is not shattered in the cross-examination. The discrepancies are as regards the sequence of events, the direction, time and order in which the accused ran away, which in our opinion are not material discrepancies. There is consistency about the fact that PW-3 Krishnabai tried to save her son by intervening in the assault. It is true that whereas, PW-2 Kavita says that they did not talk to anybody, PW-3 Krishnabai says that they informed the name of A-2 to the police. In our opinion, this would not affect the credibility of these witnesses because it is possible that being illiterate women and because they were giving evidence after about one year, they faltered while giving evidence. But both these witnesses have stated that the accused were known to them. It is an admitted fact that A-2 is from Kamraj Nagar. PW-2 Kavita has stated that she is residing in the same locality since her childhood and she knows the accused by their names. Therefore, she has rightly identified A-2. So far as PW-3 Krishnabai is concerned, she was also residing in Kamraj Nagar for 30 years. She has stated that she knew the accused as they were staying in Kamraj Nagar. She has added that she did not know the surname or father's name of A-2. She has further stated that she did not know the names of the accused but came to know them later on. PW-3 is a rustic lady. Her cross-

examination is indeed an unequal duel between a rustic woman and a trained legal mind. At different places, some questions are asked out of context and all of a sudden. Even a seasoned person would make a mistake in such circumstances. We, therefore, do not attach much importance to this. It appears to us that PW-3 Krishnabai knew A-2. She knew his first name as stated by her. She appears to have gathered his full name and intimated it to the police. Since she knew A-2, there was no question of holding any identification parade.

22. The criticism levelled by Mr. Ponda about the conduct of PW-2 Kavita also does not impress us. PW-2 Kavita has a small son. When she noticed the attack made on her husband, she was shocked. Since, she had left her son at home, she rushed home. There is nothing abnormal in this behaviour. Anxiety of PW-2 Kavita would obviously be to save her son. PW-2 Kavita has also stated that she was anxious to know about the condition of her husband but other women did not allow her to go to the hospital because she had a child with her. She has also said that her condition was also not proper. She has further stated that when the police constables came to her house, they were inquiring about the incident but she was not in a condition to reply to them properly. PW-3 Krishnabai had gone with the deceased to the hospital. She has said that she was asked to stand outside the hospital. She was informed that glucose was

administered to the deceased. After sometime, she was informed that the condition of the deceased was steady. Thereafter, she was sent home. She has clarified that as her son was profusely bleeding, she felt giddy and returned home. She has further stated that she did not go inside the hospital and see the deceased as she was stunned. She has stated that she laid on her son so as to prevent him from being attacked by A-2. It has come on record that both PW-2 Kavita and PW-3 Krishnabai were crying. Against the background of these facts, conduct of PW-2 Kavita and PW-3 Krishnabai cannot be called unnatural. They had seen the ghastly incident in which the deceased, who was closely related to them, was attacked with deadly weapons. PW-2 Kavita had to rush home because her son was at home. She would obviously be anxious about his safety. It is also clear that other women who were present there did not allow her to go to the hospital. Her condition was also not proper. Therefore, she might not have disclosed the names to anybody till she went to the police station. Similarly PW-3 Krishnabai was stunned because her son was brutally attacked. She was feeling giddy. In such circumstances, it appears that out of fear these women did not go to the police station promptly. The judgments cited by Mr. Ponda on this point are not applicable to the facts of the present case because the facts of the present case are not comparable to the facts of those cases. We are, therefore, unable to draw any inference adverse to

PW-2 Kavita and PW-3 Krishnabai because of their conduct.

23. Some arguments were advanced before us as to which document should be treated as FIR. PW-1 PN Bhosale has stated in the court that before leaving the scene of offence, he had informed PW-9 PSI Bhosale at Pant Nagar Police Station on telephone about the incident. He had narrated the facts of the incident to him. He has stated that he has given names of the assailants to PW-9 PSI Bhosale. Pursuant to this phone call, PW-9 PSI Bhosale has made entry in the station diary which is at Ex.P-32-A. PW-9 PSI Bhosale has categorically stated that PW-1 PN Bhosale did not give him the names of the assailants. PW-9 PSI Bhosale has stated that at the scene of offence PW-1 PN Bhosale narrated the facts to him and he recorded his statement in the hospital. He dictated the statement of PW-1 PN Bhosale to API Mr. Wagh, who recorded the same. The said statement is at Ex.P-12. It appears that the prosecution wanted to treat this statement as FIR. However, objection was taken to the said statement being treated as FIR because according to the defence, PW-1 PN Bhosale had informed the facts of the incident on telephone to PW-9 PSI Bhosale. According to the defence, that information was not cryptic in nature. Obviously, therefore, the defence wanted to say that that information would be FIR but not the statement of PW-1 PN Bhosale at Ex-P-12. This point was conceded by the learned special

public prosecutor in the trial court and the statement of PW-1 PN Bhosale recorded by PW-9 PSI Bhosale was not treated as FIR. In this court Mr. Ponda contended that what is stated by PW-1 in his deposition would be the FIR. In this connection, Mr. Ponda the learned counsel for the accused has relied on the judgment of the Supreme Court in *Golla Jalla Reddy and others v. State of Andhra Pradesh, 1996 Cri.L.J. 2470 (SC) and the judgment of the Gujarat High Court in Raberi Karsan Cova and others v. The State of Gujarat, 1977 Cri.L.J. 107*. We do not wish to go into this aspect of the matter. It is debatable whether Ex.P-32A which appears to be a cryptic entry could be called FIR. But we find that the statement of PW-1 PN Bhosale that he gave the names of the assailants is also not supported by PW-9 PSI Bhosale. Besides, PW-9 PSI Bhosale says that he dictated the said statement to API Wagh who recorded it and API Wagh has not been examined. In such circumstances, we feel that it would be advisable to leave the said statement out as has been done by the trial court. We are also distressed at the divergence between the testimony of PW-1 PN Bhosale and PW-9 PSI Bhosale as to whether PW-1 PN Bhosale intimated the names of the assailants to PW-9 PSI Bhosale. PW-9 PSI Bhosale may be right in his submission that PW-1 PN Bhosale did not communicate the names to him because in the station diary entry made by him immediately after receiving the telephone call from PW-1 PN Bhosale, the names of the

assailants are not noted. If the names had been communicated, there was no reason for PW-9 PSI Bhosale not to mention them. Faulty investigation is also evident from the fact that though PW-3 Krishnabai claims that she had laid on the deceased so as to prevent him from being attacked, her clothes were not taken charge of by the prosecution. Though PW-3 Krishnabai states that her clothes were taken charge of, PW-9 PSI Bhosale states that PW-3 Krishnabai did not produce her clothes nor he asked her to produce them. Considering the evidence of PW-3 Krishnabai, the prosecution ought to have seized the clothes of PW-3 Krishnabai and sent them to the chemical analyser. If the blood group of the blood found on the clothes of PW-3 Krishnabai were to match the blood group of the deceased or even if human blood were to be detected on those clothes, that would have strengthened the prosecution case. Unfortunately this is not done by the prosecution. If the Investigating Officer fails to take an important step in the investigation, the cause of the victim must not be allowed to suffer if there is other substantial evidence on record on which conviction can be based. We have already referred to the relevant judgments of the Supreme Court on this aspect. We find that evidence of PW-2 Kavita and PW-3 Krishnabai bears out the prosecution case so far as A-2 is concerned. We would not like faulty investigation to defeat interest of justice in a case like this.

24. Now the question is when all other accused have been acquitted and no specific role has been assigned to A-2 by the witnesses, can he be convicted under section 302 read with section 34 of the Code. In *Baul's case (supra)* two accused were convicted by the Sessions Court under section 302 read with section 34 of the Code and one of the accused was acquitted by the High Court in appeal. The Supreme Court held that in appeal the other accused cannot be convicted under section 302 simpliciter in the absence of proof of exact nature of injuries caused by each accused. The Supreme Court observed that it cannot be postulated in such circumstances that the other accused alone caused all the injuries and, therefore the accused can safely be convicted under section 325 instead of section 302 of the Code. The Supreme Court observed that where common intention is not proved, the prosecution must establish the exact nature of injuries caused by each accused and more so when one of the accused has got the benefit of doubt.

25. In *Achhey Lal's case (supra)*, the High Court in appeal acquitted all the accused but one and convicted him of the offence under section 302 read with sections 149 and 147 of the Code but there was no finding by the High Court that after the acquittal of those accused, the unlawful assembly consisted of five persons or more,

known or unknown, identified or unidentified. The Supreme Court held that in the circumstances, provisions of sections 149 and 147 of the Code could not be invoked for convicting the sole accused. It was observed that the conviction of the sole accused would be illegal in the absence of any individual act assigned to him.

26. In *Atmaram's case (supra)*, eight out of nine accused were acquitted on concurrent finding of lower courts that they were not involved in offence, while the appellant alone was convicted. The Supreme Court held that consequent upon the acquittal of the other eight accused, the appellant could not be convicted with the aid of section 149 of the Code more particularly in view of the concurrent findings of the courts below that the other eight persons were not in any way involved in the offence in question. The Supreme Court observed that the same principle will apply when persons are tried with the aid of section 34 of the Code. The Supreme Court observed that in either of the above situations i.e. when there is a charge under section 149 of the Code or when the accused are tried with the aid of section 34 of the Code, only on proof of the fact that the individual act of the accused caused the death of the victim, he would be liable for his own act and can be convicted under section 302 (simpliciter). In the facts before it, inasmuch as the evidence on record did not prove that the injuries inflicted by the appellant therein alone caused

the death, it was held that the appellant could be held guilty only of the offence under section 326 of the Code as he had caused a grievous injury to the deceased. The Supreme Court thus set aside the conviction and sentence recorded under section 302 of the Code and convicted the appellant therein under section 326 of the Code.

27. We must also refer to the judgment of the Supreme Court in *Rajan Rai's case (supra)* on which Mr. Borulkar has placed reliance. In that case, the appellant was convicted under section 302 read with section 34 of the Code for sharing common intention with accused Tileshwar Rai for causing the death of the deceased. Tileshwar Rai died before the commencement of trial and as such his prosecution stood dropped. It was argued that the effect of dropping of the prosecution of Tileshwar Rai would tantamount to his acquittal and, therefore, the appellant who was charged with Tileshwar Rai could not be convicted under section 302 read with section 34 of the Code. The Supreme Court on facts before it held that there was no reason to discard the evidence of witnesses so far as participation of accused Tileshwar Rai in the crime is concerned and from the evidence it was clear that the appellant shared common intention with accused Tileshwar Rai who caused death of the deceased. The Supreme Court found that there was no difficulty in holding that if the accused Tileshwar Rai would not have died, on the basis of the evidence

adduced by the prosecution, which was unimpeachable, Tileshwar Rai was liable to be convicted under section 302 read with section 34 of the Code. It was further held that merely because he died before the commencement of the trial and could not be tried, the appellant cannot take advantage from that. It is in these circumstances that the Supreme Court held that the sole appellant could not be convicted under section 302 read with section 34 of the Code.

28. We must notice the difference between *Rajan Rai's case (supra)* and the present case. In *Rajan Rai's case (supra)*, the co-accused had died and the Supreme Court was of the opinion that the co-accused could certainly have been convicted under section 302 read with section 34 of the Code. In this case, the Sessions Court has acquitted all the accused of the charge of conspiracy. The other accused have been acquitted of the offence under section 302 read with section 34 of the Code. The witnesses have not ascribed any overt act to A-2. They have not stated as to on which part of the body of the deceased A-2 dealt blows. It is not clear as to which injuries were caused by A-2. It is also not clear as to which injuries were caused by the other accused. The State has not even preferred appeal against the acquittal of the other accused. The facts of this case, therefore, can be clearly distinguished from the facts in *Rajan Rai's case (supra)*. The judgment in *Rajan Rai's case (supra)* will not

be applicable to the instant case but it would be covered by the judgments to which we have made a detailed reference hereinabove. In the light of the said judgments, we feel that it would be wrong to convict A-2 under section 302 read with section 34 of the Code because it cannot be conclusively held that it is the blow given by the accused which resulted in the death of the victim. A-2 also cannot be convicted for the offence under section 302 simpliciter for the same reason viz. that it cannot be said that the blow given by him has resulted in the death of the victim. The accused has suffered 52 injuries. There is no doubt that the injuries are grievous injuries. A-2 will have to be, therefore, convicted for voluntarily causing grievous hurt by dangerous weapon to the deceased. He will have to be, therefore, convicted for offence under section 326 of the Code. We are informed that A-2 is in jail for eight years and three months. The sentence already undergone by him would, therefore, be the sentence for the offence under section 326 of the Code. Hence, we pass the following order :

ORDER

The conviction of Accused 2 - Kishore Bhau Shinde under the impugned judgment and order dated 9/4/1999 and 12/4/1999 passed by the Sessions Court for Greater Bombay in Sessions

Case No.359 of 1998 under section 302 read with section 34 of the Code and sentence of life imprisonment awarded to him for the same and the sentence of fine on that count are quashed and set aside. Instead, Accused 2 - Kishore Bhau Shinde is convicted under section 326 of the Code and the sentence already undergone by him will be the sentence awarded for the said offence. Accused 2 - Kishore Bhau Shinde is also ordered to pay a fine of Rs.1,000/- (Rupees One Thousand only) and in default to suffer R.I. for one month.

With the above modification of the impugned judgment and order, the above appeal is dismissed.

(SMT. RANJANA DESAI, J.)

(D.G. KARNIK, J.)